Brief on the Merits

No. 15-1245

IN THE SUPREME COURT OF THE UNITED STATES

March Term, 2016

JASON ADAM TAYLOR,

Petitioner,

v.

TAMMY JEFFERSON, in her official capacity as chairman of the Madison Commission on Human Rights, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team M
Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the enforcement of a public accommodation law that requires a person to provide private business services that violate his strongly held beliefs violate the Free Speech Clause of the First Amendment?

2. Does enforcement of a public accommodation law that requires a person to provide private business services for religious events and which may compel that person to enter religious buildings violate the Free Exercise and Establishment Clauses of the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

SECONDARY SOURCES

CONSTITUTIONAL PROVISIONS

STATUTES AND REGULATIONS

CERTIFICATION BY TEAM M

We certify that the work product contained in all copies of this brief is in fact the work product of the team members; that we have complied fully with our school's governing honor code and with all Rules of the Competition.

TEAM M

February 8, 2016

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on November 12, 2015. Petitioner timely filled a petition for writ of certiorari, which this Court granted. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Jason Taylor brought this suit to request preliminarily injunctive relief against the members of the Madison Commission on Human Rights. R at 1. The Commission ordered Mr. Taylor to abate his discriminatory practices and demanded the payment of weekly fines that were issued against Mr. Taylor beginning July 14, 2014 ("the Action"). R at 2. Petitioner brought a 42 U.S.C. § 1983 action against Respondents Tammy Jefferson, Thomas More, Olivia Holmes, Joanna Milton, and Christopher Heffner, in their official capacities as Commissioners of the Madison Commission on Human Rights for deprivation of constitutional rights under color of state law. R at 1. The Commission filed a motion for summary judgment, and the District Court granted the Commission's motion. R at 12. The court held that the Action does not violate the Free Speech Clause, because photographs are not speech, and Mr. Taylor must serve the public. R at 9. The court also held that the Action is not barred by the Free Exercise Clause because there is no proof that entry into religious places substantially burdens Mr. Taylor's religious beliefs. R at 11. Further, the court held that the Action is only an enforcement of anti discriminatory actions and it does not contribute to the establishment of religion. R at 12.

Mr. Taylor submitted a timely appeal to the United States Court of Appeals for the Fifteenth Circuit seeking reversal of the District Court's grant of summary judgment. R at 39. On November 12, 2015, the Fifteenth Circuit held that the Action did not violate the Free Speech Clause of the First Amendment, because Taylor's Photography Solutions and Mr. Taylor

produce photographs that are controlled by a third party. R at 41. Furthermore, that the Action did not violate the Free Exercise or Establishment Clauses, because Mr. Taylor can leave the marketplace to avoid the Action. R at 43. On November 12, 2015 the Fifteenth Circuit affirmed the District Court's decision in granting summary judgment to the Commission. R at 44.

STATEMENT OF THE FACTS

I. Mr. Taylor's background

Jason Taylor is a photographer and owner of Taylor's Photography Solutions ("TPS"), a closely held business. R at 14. Mr. Taylor works alongside his employee's to provide the community with photography services for a variety of events including proms, graduations, birthdays, festivals, photo shoots, and weddings. R at 3. As a child, Mr. Taylor grew up in a mixed-faith household with his Jewish mother and Catholic father. R at 3. Mr. Taylor's religiously mixed family and extended family subjected him to an upbringing full of religious conflict and negative comments about how he should live his life. R at 16. The constant fighting strained relationships and soured Mr. Taylor's vision of all religion by the time he was eighteen years old. R at 17. Much of his upbringing was unhappy due to people who were unwilling to see him as anything but what they perceived his religion to be. R at 17. Mr. Taylor expelled himself from identifying with any and all religion because of the negativity and pressure he personally experienced stemming from religion. R at 3. Mr. Taylor sincerely believes that any and all religion is a detriment to the future of humanity and feels uncomfortable at all official religious events. R at 16.

II. TPS's policies and practices

TPS has a longstanding policy of nondiscrimination on the basis of religion that extends to his employees and his customers. R at 15, 18. Mr. Taylor hires employees of all religious

backgrounds and accommodates their religious beliefs by scheduling around any religious holidays they celebrate. R at 15, 18. Further, he does not assign the employees to photograph events that conflict with their own religious principles. R at 18, 28, 32. TPS also has a policy prohibiting TPS photography in any official religious event in order to avoid TPS and Mr. Taylor being associated with endorsing religion. R at 14, 15. TPS has a strict policy of not discriminating against any individual based upon his or her religion. R at 14. Mr. Taylor does not want to use his talent, or the talent and creativity of his staff for official religious events. R at 15. Mr. Taylor will photograph weddings performed by clergy members that are secular in nature and same sex couples in a church where the minister is performing a civil ceremony. R at 15. Thus, Mr. Taylor will photograph events that do not actively celebrate any religion. R at 16. Although Mr. Taylor's generally applicable policy is written on a sign in his shop, two customers sought out Mr. Taylor to photograph their official religious weddings. R at 19, 20. Mr. Taylor explained to both men that he could not photograph either of the events because of the official religious nature, not because of their independent beliefs. R at 19, 20. Mr. Taylor provided the two customers with information to a photographer located across the street that would photograph their religious events. R at 19, 20.

III. The Action

The Madison Human Rights Commission ("MHRC") informed Mr. Taylor that the two customers filed complaints against TPS and Mr. Taylor alleging discrimination on the basis of their religions. R at 20, 21. The MHRC instituted a preliminary injunction and fines ("Action") against TPS and Mr. Taylor for violation of the Mad. Code Ann. § 42- 101-2(e)(2) based on these complaints. R at 20, 21. The statute provides that the enforcement powers granted to the Commission shall not be used to show preference to any religious sect, compel a person to attend

any place of worship for the purpose of engaging in any for of religious practice, or control or interfere with the rights of conscience of any person. R at 13. Further, the statute provides a RFRA and prohibits unlawful discrimination by places of public accommodation. R at 13. Mr. Taylor was found in violation of unlawful discrimination by places of public accommodation. R at 13. The Commission cited the notice in TPS as evidence of discrimination. R at 25. This notice states that Mr. Taylor does not hold personal prejudice against any particular religion and will not deny services based upon ones affiliations with a particular religion, but TPS will not perform services for any religious services of any kind. R at 25. Lastly, the Commission provides that Mr. Taylor's general conversations with his employees evidence a pattern of discrimination. R at 25.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and find that the Action violates the Free Speech Clause, Establishment Clause, and Free Exercise Clause of the First Amendment.

The Free Speech Clause is violated by the Action because photography is inherently expressive, and it compels Mr. Taylor and TPS to accommodate third party messages and to speak when Mr. Taylor and TPS have the right not to. The rationale of *Hurley* and *Wooley* can be applied to Mr. Taylor's situation. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). These cases support that photography is inherently expressive and the Action compels speech when it forces Mr. Taylor and TPS to photograph official religious events.

The speech compulsion fails strict scrutiny because there is no compelling interest and, even if there were, it is not the least restrictive means of achieving that interest. The

government's interest in preventing discrimination is too broad and the Action does not advance that interest. It is clear from the Mad. Code Ann. § 42-101-2a, et seq. that the government's intention of the statute is not advanced by the Action. The statute aims to protect persons like Mr. Taylor. Including Mr. Taylor's action as falling within the broad prohibition on discrimination in places of public accommodation is the opposite effect the legislature intended.

The Establishment Clause is violated because the Action is both direct and indirectly coercive. Further, it is clear that a reasonable person would view the Action as the government showing preference for religion over non-religion. Thus, the Action cannot pass the Lemon test or the endorsement test and is unconstitutional.

Finally, the Free Exercise Clause is violated because the Action severely burdens Mr. Taylor's deep-rooted beliefs towards all religions by requiring him to attend and photograph official religious events or to cease the means of his livelihood. This claim, taken together with the Action's violation of the Free Speech and Establishment Clause, constitute a hybrid rights claim. As stated in *Smith*, although generally applicable statutes receive rational basis, a hybrid rights claim receives strict scrutiny. *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 894 (1990). The Action does not pass strict scrutiny, because, as seen above, the government does not have a compelling interest, and even if they did, the Action is a far cry from the least restrictive means to achieving that interest.

Moreover, even if rational basis were to apply, the Action does not pass. The Action is not reasonably related to accomplishing a legitimate state interest. Mr. Taylor is not religiously discriminating against any person. As seen on the posted notice in TPS, "members of all religions are welcome to enter this place of business and will not be denied services based solely

upon their affiliations with any particular religion." Thus, the legislatures interest in protecting citizens like Mr. Taylor is evident in the statute.

Therefore, the Action violates the Free Speech Clause, Establishment Clause and Free Exercise Clause. The Court should reverse the decision and find the Action unconstitutional.

ARGUMENT

The First Amendment of the United States Constitution states that government "shall make no law… abridging the freedom of speech... respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The First Amendment is incorporated to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV.

I. THE ACTION VIOLATES TPS'S AND MR. TAYLOR'S CONSTITUTIONAL RIGHT TO FREE SPEECH.

The Commissions application of the Madison Human Rights Act ("MHRA") through the Enforcement Action ("Action") to Taylor Photographic Solutions ("TPS") violates its constitutional right to free speech as well as its owner's, Mr. Jason Taylor. The MHRA prohibits discrimination in broad terms by forbidding "the denial of service to a place of public accommodation[1] based on a discriminatory purpose against a protected class of individuals.[2]" Mad. Code Ann. § 42-101-2a, *et seq*. First, TPS's photographs as well as Mr. Taylor's editing qualify as speech protected under the First Amendment regardless of the profit received from them. Second, the Action violates each of the two recognized categories of compelled speech because it forces TPS to accommodate another a third parties message and forces it to speak.

---

[1] A place of public accommodation is defined as an "establishment affecting interstate commerce or supported by State action…" 42 U.S.C § 2000a, *et seq*.

[2] Protected classes include race, color, religion, and national origin. 42 U.S.C § 2000a, *et seq*.

Finally, the Action fails strict scrutiny because there is government has provided no evidence of a compelling interest, and even if there were, the Action is not the least restrictive means.

A. TPS PHOTOGRAPHS QUALIFY AS PROTECTED SPEECH UNDER THE FIRST AMENDMENT REGARDLESS OF THE PROFIT RECEIVED FROM THEM.

TPS photographs and Mr. Taylor's editing of those photographs qualify as protected speech under the First Amendment regardless of the profit received from them. Free speech protection under the First Amendment can extend to photographs. *Elane Photo., LLC v. Willock*, 309 P. 3d 53, 63 (N.M. 2013)(analyzing commercial photography under speech compulsions); *See also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995)(observing that abstract art and instrumental music are "unquestionably shielded" by the First Amendment); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)(concluding that photographs are protected under copyright law because they embody the photographers creative choices). Photographs inherently communicate some idea or concept to those who view them and are entitled to First Amendment protection. *Bery v. City of New York*, 97 F. 3d 689, 696 (2d Cir. 1996). Exercising any amount of control over artistic expression constitutes more than a mere passive conduit of speech and protected by the First Amendment. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

For example, in *Elane Photography v. Willock*, the court assumed without accepting photography as inherently expressive by analyzing mandated photography of certain persons under compelled speech prohibitions. *Willock*, 309 P. 3d at 63. In *Miami Herald Pub. Co. v. Tornillo*, the Court found that "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Tornillo*, 418 U.S. at 528. The Court reasoned that "the choice

of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper… constitute the exercise of editorial control and judgment." *Id*. The Court concluded that the government cannot compel a for-profit business to publish a private party's message, because it invades the businesses freedom of mind guaranteed by the First Amendment. *See id*.

Here, like *Elane Photography*, TPS photographs qualify for First Amendment protection, because they are inherently expressive forms of artistic expression. The court of appeals attempts to discredit photography as speech by incorrectly applying the standard for symbolic speech, which seriously undermines the courts tacit acceptance in *Elane Photography*. The test for symbolic speech is irrelevant when speech is found to be inherently expressive. Moreover, similar to *Tornillo*, TPS constitutes more than a mere conduit of expression, because of the editorial judgment exercised over the photographs. From capturing the expressive event, to editing it in way that glorifies the event, TPS is intimately associated from start to finish with each photograph.

The court in *Elane Photography* attempts to distinguish commercial photography by pointing out that public accommodations statutes could be avoided by eliminating the commercial aspect of his photography. This is an impermissible ultimatum that violates TPS and Mr. Taylor's constitutional rights to free speech. Artistic expression created for compensation does not diminish its First Amendment protection. *Riley v. Natl. Fedn. of the Blind of N. Carolina, Inc.*, 108 S. Ct. 2667, 2681 (1988)(finding that it is well settled that a speakers rights are not lost merely because compensation is received). "A speaker is no less a speaker because he or she is paid to speak." *Id.* at 2681. Compensation is an incentive to creating artistic expression, and compensation allows for more expression in the marketplace of ideas. *Eldred v.*

Ashcroft, 537 U.S. 186, 226 (2003). Furthermore, as seen above, in *Tornillo*, the Court concluded that the government invades freedom of mind when it compels a for-profit business to publish a private party's message. In sum, it is undeniable that speech is implicated and First Amendment protection is applicable to TPS photographs, because they are inherently expressive. Specifically, the prohibitions on compelled speech are applicable to these inherently artistic expressions.

B. THE ACTION VIOLATES TPS'S AND MR. TAYLOR'S CONSTITUTIONAL PROTECTION AGAINST COMPELLED SPEECH.

The Action violates TPS's right to be free of government speech compulsions. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). There are two recognized categories of unconstitutional government compulsion of speech. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61-63 (2006). The government cannot force a speaker to host or accommodate another speaker's message or tell people what they must say. *Id*. Here, the Action forces TPS and Mr. Taylor to accommodate any and all third party messages at their request to be photographed. Additionally, the Action has the effect of unconstitutionally forcing TPS and Mr. Taylor to speak when they do not wish to. Therefore, the Action is an unconstitutional violation of TPS and Mr. Taylor's right not to be compelled to speak.

1. THE ACTION REQUIRES TPS AND MR. TAYLOR TO ACCOMMODATE THIRD PARTY MESSAGES, AND IT AFFECTS THEIR MESSAGE.

The Action requires TPS and Mr. Taylor to accommodate all third party messages that wish to be accommodated, which affect both TPS's message and Mr. Taylor's message. State

law cannot force a speaker "to host or accommodate another speaker's message where the complaining speakers own message is affected by the speech it is forced to accommodate." *Rumsfeld*, 547 U.S. at 63. A person's message can be affected, even when the idea they are intending to communicate is unclear. *Hurley*, 515 U.S. at 558. "First Amendment protection [does not] require a speaker to generate, as an original matter, each item feature in the communication." Id. at 570.

In *Hurley*, the Court found that organizers of a parade did not have to include an openly gay, lesbian and bisexual marching group, because the parade organizers could not be compelled to accommodate a third party message. *Id*. at 573. The Court reasoned that a parade is inherently expressive and protected from compelled speech under the Free Speech Clause. *Id*. at 568. Although the parade had no organized message, the Court found that marchers intend to convey a message to each other and to bystanders and that "every participating unit affects that message conveyed by the private organizers." *Id.* at 568, 572. In *Rumsfeld*, federal funding was conditioned on universities allowing military recruiters access to their campus and students. *Rumsfeld*, 547 U.S. at 55. The Court found that hosting recruiting receptions was not inherently expressive and did not require the university to say anything nor did it limit what they can say. *Id.* at 60. The Court found that this did not amount to compelled speech, because hosting recruiting receptions on campus does not suggest that the campus agrees with every recruiter's speech. *Id*. at 49.

Like the parade in *Hurley*, photography is inherently expressive and the production of photographs, like each participating unit in the parade, embodies a message that affects the message conveyed by TPS and Mr. Taylor. The photographs taken by TPS convey a message to those who view them, because Mr. Taylor and his employees are each sought out by customers

for their specific editing skills. Further, requiring TPS to attend and photograph religious events in a respectful and praiseworthy manner affects its message. Specifically, it forces TPS and Mr. Taylor to appear as endorsing official religious events. This is misleading to potential customers and members of the community who view Mr. Taylor's photographs, because they will at a minimum believe he has nothing against religion. This affects his message. Moreover, TPS and Mr. Taylor are forever tied to these artistic expressions once they are printed, and he has no control over what audience will view them, nor what that audience will think. This is a pure invasion of their right to autonomy. Unlike the recruiting receptions in *Rumsfeld*, photography is inherently expressive. TPS's intended message is intrinsically intertwined with the photography it affirmatively produces. It is undeniable that those who view TPS's work are aware of the intimacy the business must have from start to finish in order to produce unique photographs of every event they photograph. Forcing Mr. Taylor to actively attend religious ceremonies, intimately photograph the event and invest hours editing the images to cast the event in a praiseworthy light is far more intrusive than passively allowing recruiters on a campus.

Although *Elane Photography* attempts to distinguish photography from the parade in *Hurley* by stating that photography expresses a message only to the clients and their loved ones, not to the public is erroneous. This is a complete disregard for the world we live in today where it is more than a common occurrence for photographs to be showcased to the world on Facebook, Twitter, and Instagram. *See Facebook: The New Town Square* 44 Sw. L. Rev. 385, 386 (2014). The very nature of photography is to be used to capture moments of time so that they can forever be remembered and shared with whomever the customer decide to share them with. There is n way to forecast what every person viewing TPS photographs will perceive and related to TPS and Mr. Taylor. In sum, the Action requires TPS and Mr. Taylor to accommodate third party

messages, which affects both TPS's message and Mr. Taylor's message. Therefore, the Action violates the doctrine on compelled speech by infringing on TPS and Mr. Taylor's by forcing them to accommodate another's message. Moreover, the Action compels speech and must satisfy strict scrutiny to be deemed constitutional.

2. THE ACTION REQUIRES TPS AND MR. TAYLOR TO SPEAK AND INFRINGES ON THEIR CHOICE TO NOT SPEAK.

The Action requires TPS and Mr. Taylor to speak and infringes on their freedom to choose what to say. "Freedom of speech includes both the right to choose what to say as well as the right to not say anything at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)(quoting *West Va. State Bd. Of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). A person cannot be required to speak, even if it does not affect their message or would clearly be seen as another's message. See *Wooley*, 430 U.S. at 714(finding that one who is merely a courier for a message they do not agree with is compelled speech even though no one will think they are the ones saying it). Compelling an affirmative expressive act involves a more serious infringement upon personal liberties than one that compels a passive expressive act. *Id*. at 715.

In *Barnette*, the Court established the right to refrain from speaking. *Barnette*, 319 U.S. at 642. The Court held that a Jehovah's Witness has the right to refuse to say the pledge of allegiance at school, because the First Amendment equally protects the right to not speak. *Id*. at 645. The Court reasoned that mandating participation in the pledge of allegiance is a speech compulsion that intrudes on an individual's freedom of thought and can be seen as unconstitutionally requiring "affirmation of a belief and an attitude of mind." *Id*. at 633. Similarly, in *Wooley v. Maynard*, the Court held that the state could not require a person to keep the state motto printed on the license plate of his car, because it would constitute a pure speech

compulsion. *Wooley*, 430 U.S. at 717. The Court found that a pure speech compulsion does not require that a third party would understand the government printed motto on the government provided and government mandated license plate as the driver's own words. *Id*. at 715 The Court reasoned that even if it does not affect their message, they have the right to not be conduits of the government's message. *Id*.

Like *Wooley* and *Barnette* , TPS and Mr. Taylor have the right to not speak. The Court of Appeals fails to properly analyze the Action under the *Barnette* and *Wooley* precedents for two reasons. First, unlike the prohibited compulsion of accommodating another's message, the prohibition on compelling one to speak when they do not want to say anything at all does not require a third party to view the photographs as a message TPS and Mr. Taylor endorse. Second, and most importantly, it does not matter that their message be affected at all. TPS has a constitutional right to refuse to become a courier for speech they do not want to communicate. Compelling TPS to photograph religious ceremonies is an affirmative act that seriously infringes on their right to not speak, even more so than the passive act that was found to be a speech compulsion in *Wooley*. The Action requires TPS to affirmatively take, edit and produce photographs that artistically showcase official religious events in a praiseworthy light.

Elane Photography distorts these precedents to apply only in very narrow situations where a specific government message is being compelled. Specifically, *Elane Photography* incorrectly assumes that the pledge of allegiance is nothing more than a government message. However, this is a complete disregard for the crux of the controversy the pledge of allegiance has received for making a statement. These precedents are not so narrowly applicable as *Elane Photography* portrays them to be.

C. STRICT SCRUTINY APPLIES TO TPS'S AND MR. TAYLOR'S

COMPELLED SPEECH CLAIM, AND THE COMMISSION HAS NOT SATISFIED THAT STANDARD.

The Action does not satisfy the standard of strict scrutiny. Government speech compulsions are presumptively unconstitutional and must satisfy strict scrutiny in order to be deemed constitutional. See *Turner Broad. System, Inc.* 512 U.S. at 642. To satisfy strict scrutiny, the government must prove its actions are narrowly tailored and the least restrictive means to serve a compelling state interest. *Wooley*, 430 U.S. at 715,16. This burden rests on the government. *See id*. The broad interest of preventing discrimination is insufficient to satisfy this burden. *Hurley*, 515 U.S. at 578,79. The particular interest in applying a law to specific facts must be identified to determine if the government interest is compelling. *Id*.

In *Barnette*, the Court found forcing students to participate in the pledge of allegiance was compelled speech, and that loyalty and patriotism were not sufficient compelling interests. *See Barnette*, 319 U.S. at 642 (Murphy, J., concurring, finding that it was not compelling because it was not essential to effective government or orderly society and the benefits that accrue are not sufficiently definite or tangible to justify the invasion of freedom). Further, the Court found that even fi there was a compelling interest, conditioning the privilege of public education on compliance was not the least restrictive means.

Similar to *Barnette*, the Commission provides the Action achieves a general interest in eliminating discrimination by compelling Mr. Taylor and his employees to attend and photograph official religious events. Like patriotism, the benefits that will accrue from the Action are not sufficiently tangible. It is established that a broad interest in preventing discrimination is insufficient to pass strict scrutiny. See *Hurley*, 515 U.S. at 578,79. Although antidiscrimination laws are aimed at ensuring services are freely available in the market and

protecting individuals from humiliation, such a general purpose is not advanced here. *Elane Photo., LLC* 309 P.3d at 64. It cannot be questioned that there are numerous other photography businesses offering services available to the public to photograph religious ceremonies. To claim that customers would be humiliated by Mr. Taylor's sincere belief to not attend and document official religious ceremonies is a far cry from the "humiliation" antidiscrimination laws are intending to eliminate. In contrast to *Heart of Atlanta Motel*, where an African American couple was denied the right to a hotel room, photography is far from a necessity, much less having the specific photographer you want. *Heart of Atlanta Motel, Inc. v. U. S.*, 379 U.S. 241, 244 (1964). Thus, the Commission provides no evidence that the Action is narrowly tailored or the least restrictive means to serve a compelling interest.

Moreover, although the Commission alleges TPS and Mr. Taylor discriminate, it provides no legitimate evidence of such discrimination. The notice the Commission refers to as evidence of discrimination explicitly states, "members of all religions are welcome to enter… and will not be denied services based… upon their… religion." R at 23. Furthermore, the Commission distorts Mr. Taylor's conversations with his employees to evidence discriminatory actions. In fact, the opposite is true. Mr. Taylor has made every religious accommodation his employees have requested including ones as absurd as not touching light switches. Moreover, the statute Mr. Taylor allegedly violated provides that the enforcement powers granted to the Commission shall not be used to show preference to any religious sect, compel a person to attend any place of worship for the purpose of engaging in any for of religious practice or control or interfere with the rights of conscience of any person. R at 13. Thus, the limits placed on the Commissions enforcement power are completely violated by the Action. The Action is therefore overbroad, because including TPS and Mr. Taylor has the opposite effect of the interest stated in the statute.

In sum, to the extent that a compelling government interest exists for the Action, it is not the least restrictive means to achieve that interest. Therefore, the Action violates the Free Speech Clause as it violates both compelled speech prohibitions and does not survive strict scrutiny.

II. THE ACTION VIOLATES THE RELIGION CLAUSES.

The Action violates both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause guarantees at a minimum "a government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 578 (1992)(citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). The Free Exercise Clause embraces the freedom to believe and the freedom to act. *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 894 (1990). Government neutrality between religion and non-religion is mandated in the First Amendment. *Epperson v. State of Ark.*, 393 U.S. 97, 103 (1968). Here, the Action violates the Establishment Clause by coercing Mr. Taylor to attend official religious events as well as showing preference for religious activity over nonreligious activity. Further, the Action violates the Free Exercise Clause by severely burdening Mr. Taylor's freedom to not attend official religious events, because it is against his sincerely held beliefs to do so.

A. THE ESTABLISHMENT CLAUSE IS VIOLATED BY THE ACTION BECAUSE IT FORCES MR. TAYLOR AND TPS EMPLOYEES TO ATTEND OFFICIAL RELIGIOUS EVENTS.

The Establishment Clause prohibits the government from being able to force or influence a person to go to church against his will or force him to profess a belief in any religion. *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961). To determine government compliance with the Establishment Clause, there are three independent tests courts use. *Lee*, 505 U.S. at 592; *Lemon*

v. Kurtzman, 403 U.S. at 602, 612-13 (1971); *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989). The coercion test, the Lemon test, and the endorsement test, which focuses on the first two prongs of Lemon, are each used to determine if the Establishment Clause has been violated. *Id*. Here, the Action is in violation of all three tests.

1. THE ACTION IMPERMISSIBLY COERCES RELIGIOUS ACTIVITY BY REQUIRING MR. TAYLOR AND TPS EMPLOYEES TO ATTEND AND PARTICIPATE IN OFFICIAL RELIGIOUS EVENTS.

The Action is a violation of the Establishment clause, because it impermissibly coerces Mr. Taylor to attend official religious events and remain respectful during them. The government at a minimu, may not coerce anyone to participate in religious activities. *Lee,* 505 U.S. at 587. Subtle and indirect pressure can constitute coercion. *Id*. at 578 (holding that psychological pressure to stand and remain silent while a prayer takes place is coercion). A non-mandatory event can be the basis for unconstitutional coercion. *Id*. (reasoning that standing or remaining silent during a graduation prayer at a non mandatory graduation is unconstitutional coercion). Attending an event as a mere spectator constitutes participation in religious activity that can be deemed coercive. *Id*. (remaining silent during a prayer qualifies as an expression of participation in the prayer).

In *Lee*, the Court held that a nondenominational prayer at a graduation ceremony was coercive even though attendance at graduation is not mandatory nor is participating in said prayer. *Id*. The Court found that students who attended the graduation and exercised their right to not say the prayer would face indirect coercion because of the social pressure from students who support prayer. *Id*. In *Doe*, the Court found that a prayer led by students before a football game constituted indirect coercion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

The Court reasoned that the prayer forced the audience to participate in religion. *Id*. at 312. The Court found that even though the public has a choice not to attend the game if they do not want to hear the prayer, they should not be forced to make such a choice, because it infringes on their constitutional rights of Free Exercise. *Id*.

Similar to *Lee* and *Doe*, the Action at a minimum involves indirect coercion. The social pressure to remain respectful during official religious events is severe compared to mere student pressure during a prayer before a football game or graduation. Weddings and baptisms are the utmost religious events in which social pressure to remain silent and respectful is at its peak. Furthermore, the Action requires Mr. Taylor to "choose" between his livelihood or his sincerely held religious beliefs. More severe than the choice to attend graduation in *Doe*, this "choice" is clearly unconstitutional. Mr. Taylor has dedicated his life to becoming a successful and sought after photographer. It is an extremely distorted view that Mr. Taylor has a "choice" to exit the marketplace when he has put his entire life into TPS and has bills and a wife to take care of. Moreover, unlike *Lee* and *Doe*, photography requires affirmative participation in an official religious event and is far from subtle or indirect. The requirement of affirmative participation coupled with the monetary fines constitutes direct coercion. Compelling a person to attend a religious event and affirmatively participate in it is monumentally worse than football game patrons or graduation attendees listening to a prayer.

2. ALTERNATIVELY, THE ACTION DOES NOT PASS THE LEMON OR ENDORSEMENT TEST'S BECAUSE IT CAN REASONABLY BE PERCEIVED AS PREFERRING RELIGION OVER NON-RELIGION.

The Action does not pass the Lemon or endorsement test. The Lemon test is a three-pronged test that includes (1) government must have a primarily secular legislative purpose, (2) the

action's principal or primary effect must be one that neither advances nor inhibits religion, and (3) the action must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Lemon test has received heavy criticism and the endorsement test has been found a viable substitute focusing only on the first two prongs. See *County of Allegheny v. Am. Civ. Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989). If one prong is violated, it is unconstitutional**.** See *Lemon*, 403 U.S. at 612-13. An action that can reasonably be perceived as preferring religion over non religion fails both the Lemon test and the endorsement test. See *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); See *County of Allegheny*, 492 U.S. at 573; See *Doe*, 530 U.S. 290 (2000)(finding that having high school students vote on whether to have a speaker lead a prayer is government action that prefers religion). The endorsement test is violated when a 'reasonable non-adherent' of religion would think that the government action is an endorsement of a particular religious practice or belief. *See County of Allegheny*, 492 U.S. at 620.

In *Caldor*, the Court found that a statute providing that no person may be required by an employer to work on his or her Sabbath was an unqualified right for individuals to not work for religious reasons and favored religion over all other interests. *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). The Court reasoned that the government's action symbolically endorsed religion over non-religion by solely providing a benefit for religion. *Id*. at 708. The Court found that the statutes effect was more than incidental or remote and had the primary effect of advancing a particular religious practice. *Id*. at 710. In *Amos*, the Court found that an exemption for religious organizations from a prohibition against discrimination in employment met the second prong of the Lemon test. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). The Court reasoned that "a law is not

unconstitutional simply because it allows churches to advance religion, which is their very purpose." *Id*. at 337. The Court held that the government itself has to advance religion through its own activities and influence. *Id*.

Like *Caldor*, the Action has the primary effect of benefiting religious persons over nonreligious persons by mandating attendance at official religious events. A reasonable observer would perceive this mandate as the Commission favoring the values of religious persons over nonreligious persons. It is erroneous to disregard this preference for religion by stating that there is a "choice" to exit the marketplace. Mr. Taylor's "choice" does not discredit the Action's effect of endorsing religion. Unlike *Amos*, the Commission is advancing religion through its own activities and influence. Although Mr. Taylor enters houses of worship at his own will, this does not in anyway lessen his constitutional protection from the government forcing him to attend official religious events. Therefore, the Establishment Clause is violated by the Action to TPS because it is unduly coercive and, even it was found not to be coercive, it fails to pass the Lemon or endorsement test.

B. THE FREE EXERCISE CLAUSE IS VIOLATED BY THE ACTION.

The Free Exercise Clause is violated by the Action, because it requires conduct that violates Mr. Taylor and his employees sincerely held beliefs. The Free Exercise Clause embraces the freedom to believe and freedom to act. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "The freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). A closely held corporation can exercise a Free Exercise claim. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). Here, the Action infringes on the Free Exercise Clause by burdening sincerely held religious beliefs and can be combined with the Free

Speech and Establishment Clauses to be deemed a hybrid rights. Finally, it fails to survive strict scrutiny or rational basis because the Action.

1. THE ACTION VIOLATES THE FREE EXERCISE CLAUSE.

The Action violates the Free Exercise Clause because it forces TPS and Mr. Taylor to attend official religious events against their sincerely held beliefs. The Free Exercise Clause is violated when a sincere belief is present and it is substantially burdened as a result of government action. *City of Woodinville v. Northshore United Church of Christ*, 211 P. 3d 406, 642-43 (Wash. 2009). A substantial burden is assumed when the exercise of a licensed profession is contingent on compliance with a rule requiring specific conduct. See *Burwell*, 134 S. Ct. at 7769-72 (finding that business practices compelled or limited by tenets of a religious doctrine fall within the understanding of the free exercise of religion under *Smith*). The Free Exercise Clause protects a person's choice to abstain from physical acts including assembling with others for a worship service. *Smith*, 494 U.S. at 877. Forcing a person to attend a religious ceremony violates the heart of the Free Exercise Clause. *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 9 (1947)(acknowledging that the religious persecution in the colonies included requiring all persons whether believers or non-believers to attend religious services).

In *Yoder v. Wisconsin*, the Court found that a law mandating school attendance for fourteen and fifteen year olds was unconstitutional as applied to the Amish who object to formal education beyond the eighth grade. *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). The Court reasoned that this violated their constitutional right of free exercise, because it infringed on the right of the parents to control the upbringing of their children. *Id*. The Court concluded that objection to formal education because of their religions was a sincerely held belief. *Id.* The Court found that the law would seriously burden the free exercise of the groups sincerely held

religious beliefs because the affect of the law was one intimately related to daily living. *Id*. at 216.

Similar to *Yoder*, the Action violates the Free Exercise Clause by requiring Mr. Taylor as well as his employees to attend official religious events against their sincerely held religious beliefs. Mr. Taylor sincerely believes that religion causes conflict and strife because of his mixed faith upbringing and the pressure he was subjected to choose a particular religion at a very young age. Like *Yoder*, the burden on Mr. Taylor's as well as TPS employees sincerely held beliefs is substantial, because the Action intimately affects their daily living. Mr. Taylor would be required to attend official events and affirmatively participate in them as seen above. The Action hits at the heart of the Free Exercise Clause by requiring their affirmative participation and would gravely endanger Mr. Taylor and his employees constitutional rights.

2. THE ACTION VIOLATES THREE INDIVIDUAL CONSTITUTIONAL RIGHTS WHICH CONSTITUTES A HYRBIRD RIGHTS CLAIM.

Although the standards of *Smith* apply under generally applicable statutes, the Action violates the Free Speech Clause, Establishment Clause, and the Free Exercise Clause, which constitutes a hybrid rights claim. *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 894 (1990). The Free Exercise Clause can be combined with other constitutional protections, to constitute a hybrid rights claim. *See Smith*, 494 U.S. at 881 (providing an exception for hybrid rights). Hybrid rights requires that each claimed infringement be individually "colorable." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004). "Colorable" means there is a fair probability or mere likelihood, but not certitude, of success on the merits of each claim individually. *Id*. at 1297. Although the circuits have been split on the validity of hybrid rights claims, when clear constitutionally protected rights are infringed upon,

hybrid rights claims have been upheld. See *First United Methodist Church of Seattle v. Hrg. Examr. for Seattle Landmarks Preservation Bd.*, 916 P.2d 374 (Wash. 1996); *People v. DeJonge*, 449 N.W.2d 899 (Mich. App. 1989); *Chalifoux v. New Caney Indep. Sch. Dist.,* 976 F. Supp. 659 (S.D. Tex. 1997).

In *Yoder*, the Court found that the infringement on the Amish's free exercise rights and right to control the upbringing of their children were independent valid constitutional infringements. *Yoder*, 406 U.S. at 234. Thus, the Court can be seen as validating these individual claims as constituting a colorable hybrid rights claim. *See Id*. at 233. Like *Yoder*, it is clear that there are independent valid constitutional rights at issue as seen above. Therefore, the Action infringes on three independent constitutional rights including Free Speech, Establishment and Free Exercise, each of which is a valid claim.

3. THE HYBRID RIGHT CLAIM TRIGGERS STRICT SCRUTINY AND FAILS TO MEET THAT STANDARD.

Although rational basis is the general standard of review for free exercise claims, when hybrid rights are asserted strict scrutiny must be applied. *Smith*, 494 U.S. at 908 (overruling the strict scrutiny standard for free exercise claims, but distinguishing a hybrid situation); *Krafchow v. Town of Woodstock*, 62 F. Supp. 2d 698, 712 (N.D.N.Y. 1999). To satisfy strict scrutiny, the government must prove its actions are narrowly tailored and the least restrictive means to serve a compelling state interest. *Sherbert v. Verner*, 83 S. Ct. 1790, 1793 (U.S.S.C. 1963). The burden rests on the government. *Holt v. Hobbs*, 135 S. Ct. 853, 857 (2015). The broad interest of preventing discrimination is insufficient to satisfy this burden. *Hurley*, 515 U.S. at 578, 79. The particular interest in applying a law to specific facts must be identified to determine if the government interest is compelling. *Id*. Compelling interest are "those governmental objectives

based upon the necessitates of national or community life such as threats to public health and welfare." *State v. Balzer*, 954 P.2d 931, 937 (Wash. App. Div. 2 1998).

In *Holt v. Hobbs*, a grooming policy at a corrections center was found to infringe on a Muslim's right to growing a beard, which is a necessary part of the practice of his religion. *Holt* 135 S. Ct. at 858. The government had the burden to prove that the grooming policy furthered a compelling government interest and was the least restrictive means of the interference. *Id*. at 857. The Court held that the government did not satisfy the "exceptionally demanding" standard of strict scrutiny because the grooming policy was not the least restrictive means to serve the interest of quick identification and an inability to hide contraband. *Id*. at 858. Further, the Court held that these interests were not compelling. *Id*. at 857. Like *Holt*, the Action is not the least restrictive means and the Commission does not provide a compelling interest as seen above. Furthermore, as seen above, the Action is not the least restrictive means. Therefore, the Action violates the Free Exercise clause, because it forces him to attend religious ceremonies and the government failed to meet its burden of satisfying strict scrutiny.

4. EVEN IF STRICT SCRUTINY IS FOUND NOT TO APPLY, THE ACTION FAILS RATIONAL BASIS BECAUSE THE ACTION IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Even if strict scrutiny were found not to apply, the Action fails to meet rational basis, because it is not rationally related to the legitimate government interest. To pass rational basis the state action must be rationally related to a legitimate government purpose. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985).

In *City of Cleburne*, the Court used rational basis to invalidate a zoning ordinance that prevented the operation of a home for the mentally disabled. The Court concluded that there was

not a legitimate purpose, and that even if there were; the action was not a reasonable way of accomplishing the goals. The city stated students attending school near where the home would be built would harass the mentally disabled occupants. The Court held that the justifications the city stated were based on prejudices against the mentally disabled and that indulging in such private biases is not a legitimate government purpose. *Id*. at 448,9. Like *City of Cleburne*, the Action does not pass rational basis, because the Action is not reasonably related to ending religious discrimination. Mr. Taylor is not religiously discriminating against any person. The posted notice at TPS states "members of all religions are welcome to enter this place of business and will not be denied services based solely upon their affiliations with any particular religion." R at 23. Moreover, as seen above, the legislatures interest in protecting citizens like Mr. Taylor is evident in the Mad. Code Ann. § 42-101-2a, et seq.

CONCLUSION

For the foregoing reasons, Mr. Taylor respectfully requests that this court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and find that the Action violates the Free Speech Clause, Establishment Clause, and Free Exercise Clause of the First Amendment.